

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

A NEW YORK LIMITED LIABILITY PARTNERSHIP

THE McPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100

WASHINGTON, D.C. 20005-2327

(202) 682-3500

FAX (202) 682-3580

NINE QUEEN'S ROAD CENTRAL

HONG KONG

852-2845-8989

FAX 852-2845-3682

IRVING GASTFREUND

(202) 682-3526

Internet E-Mail Address

irvg@ix.netcom.com

425 PARK AVENUE
NEW YORK, NY 10022-3598

(212) 836-8000

FAX (212) 836-8689

1999 AVENUE OF THE STARS

SUITE 1600

LOS ANGELES, CA 90067-6048

(310) 788-1000

FAX (310) 788-1200

February 10, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Amendment of
Section 73.202(b)
Table of Allotments
FM Broadcast Stations
Cheyenne, Wyoming
(MM Docket No. 96-242, RM 8940,
Montgomery Broadcasting Limited Liability Company)

Dear Mr. Caton:

Submitted herewith for filing, on behalf of Montgomery Broadcasting Limited Liability Company, Petitioner in the above-captioned FM channel allotment rulemaking proceeding, are an original and four (4) copies of its Reply Comments in response to the Notice of Proposed Rule Making in MM Docket No. 96-242 (RM-8940), ___ FCC Rcd ___, DA 96-1993 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, released December 6, 1996), and in response to the Comments on Proposed Rulemaking and Counterproposal filed in this proceeding on January 24, 1997 by Magic City Media, Inc. ("MCM") and its President Victor A. Michael, Jr. The enclosed Reply Comments of Montgomery Broadcasting Limited Liability Company are being submitted herewith pursuant to the above-referenced Notice of Proposed Rule Making, and pursuant to the provisions of the Appendix to that Notice of Proposed Rule Making, and to the provisions of Sections 1.415 and 1.420 of the Commission's Rules.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

Mr. William F. Caton
February 10, 1997
Page 2

Please direct any inquiries concerning this submission to the undersigned at the Washington, D.C. offices of this Firm.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER, LLP

By: 

Irving Gastfreund
Counsel for
Montgomery Broadcasting Limited
Liability Company

Enclosures

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

RECEIVED
DEC 11 1997

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 96-242
Table of Allotments)	RM-8940
FM Broadcast Stations)	
(Cheyenne, Wyoming))	

TO: Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau

REPLY COMMENTS OF
MONTGOMERY BROADCASTING LIMITED LIABILITY COMPANY

MONTGOMERY BROADCASTING LIMITED LIABILITY COMPANY

("Montgomery"), pursuant to Sections 73.202(b), 1.415 and 1.420 of the Commission's Rules, and pursuant to Section 303 of the Communications Act of 1934, as amended, and pursuant to the applicable provisions of the Notice of Proposed Rule Making in MM Docket No. 96-242 (RM-8940), ___ FCC Rcd ___, DA 96-1993 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, released December 6, 1996), by its counsel, hereby submits its instant Reply Comments in response to the above-referenced Notice of Proposed Rule Making in the above-captioned rulemaking proceeding, which proposes an amendment to the FM Table of Allotments, as set forth in Section 73.202(b) of the Commission's Rules, to add FM Channel 229A to Cheyenne, Wyoming; and in response, specifically, to the Comments on Proposed Rulemaking and Counterproposal ("Counterproposal"), filed in the above-captioned proceeding on or about January 24, 1997 on behalf of Magic City Media, Inc. ("MCM") and its President, Victor A. Michael, Jr. In support whereof, it is shown as follows:

I. Introduction

On November 7, 1996, Montgomery filed its Petition For Rulemaking in the above-captioned proceeding, in which Montgomery proposed the allotment of Channel 229A to the community of Cheyenne, Wyoming, as that community's sixth local FM transmission service. Montgomery therein demonstrated that the community of Cheyenne, Wyoming, had need for an additional commercial FM channel in that community and also expressed a present intent of submitting an application to the Commission for a construction permit for a new FM station on Channel 229A in Cheyenne, Wyoming, if the Commission were to assign that channel there. Furthermore, in that Petition For Rulemaking, Montgomery committed itself to construct the station on FM Channel 229A in Cheyenne, Wyoming, as expeditiously as possible if its application for a construction permit for Channel 229A in Cheyenne were granted. In addition, submitted together with Montgomery's aforementioned Petition For Rulemaking was an attached Engineering Statement which demonstrated that FM Channel 229A can be assigned at the reference point specified in that Engineering Statement with a site restriction just north of the City of Cheyenne, Wyoming, and still be in compliance with all applicable Commission channel separation requirements and applicable Commission Rules. Accordingly, Montgomery's above-referenced Petition for Rulemaking demonstrated that the allocation of FM Channel 229A to Cheyenne, Wyoming, would be in the public interest, and Montgomery respectfully requested that the Commission institute rulemaking proceedings contemplating allotment of FM Channel 229A to Cheyenne, Wyoming.

In its Notice of Proposed Rule Making in MM Docket No. 96-243 (RM-8925), ___ FCC Red ___, DA 96-1994 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, released December 6, 1996), the Allocations Branch of the Mass Media Bureau's Policy and Rules Division proposed the allotment of Channel 258A to Chugwater, Wyoming. The Allocations Branch therein expressly stated as follows:

“Our engineering analysis indicates that Channel 229A at Chugwater conflicts with a pending proposal for the allotment of Channel 229A at Cheyenne, Wyoming (RM-8940).¹ However, in an effort to accommodate petitioner's proposal an alternate Class A channel has been found [for Chugwater, Wyoming] to avoid the conflict. We believe the proposal warrants consideration since the proposed allotment of Channel 258A at Chugwater, Wyoming, could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 258A can be allotted to Chugwater [Wyoming] in compliance with the Commission's minimum distance separation requirements at city reference coordinates [Footnote omitted.]”

Id. at slip op. at 1-2, ¶3.

In short, based on the Commission's sua sponte action in MM Docket No. 96-243 (RM-8925), Channel 229A is still being proposed by the Allocations Branch of the Mass Media Bureau's Policy and Rules Division for allotment to Cheyenne, Wyoming, consistent with Montgomery's proposal and the Notice of Proposed Rule Making in MM Docket No. 96-242 (RM-8940).

As noted above, on December 6, 1996, the Allocations Branch of the Mass Media Bureau's Policy and Rules Division issued its Notice of Proposed Rule Making in MM Docket No. 96-242 (RM-8940), ___ FCC Red ___, DA 96-1993 (Allocations Branch, Policy and Rules Division, Mass Media Bureau, released December 6, 1996), involving Montgomery's rulemaking

¹ As will be noted, RM-8940 (MM Docket No. 96-242) is the November 7, 1996 Petition For Rulemaking of Montgomery.

proposal. The Allocations Branch therein formally proposed that FM Channel 229A be allotted to Cheyenne, Wyoming, as that community's sixth local transmission service. Thus, that Notice of Proposed Rule Making was fully consistent with the Notice of Proposed Rule Making of the Allocations Branch in MM Docket No. 96-243 (RM-8925), involving the allotment of FM Channel 258A to Chugwater, Wyoming.

On January 27, 1997, Montgomery filed with the Commission its Comments in support of its proposal, as required by the Notice of Proposed Rule Making in this proceeding. Montgomery, in its Comments herein, reaffirmed that, if FM Channel 229A is allotted to Cheyenne, Wyoming, as proposed, Montgomery intends to file an application for Channel 229A in Cheyenne, Wyoming, within the appropriate filing window, and, if the latter application is granted, Montgomery stated in its Comments, herein that it intends to construct the station promptly. Montgomery further incorporated in its Comments, by reference, the contents of its November 7, 1996 Petition For Rulemaking in this proceeding and of the Engineering Statement annexed thereto. In addition, in its Comments herein, Montgomery demonstrated more clearly and reaffirmed that the City of Cheyenne, Wyoming, is a separate community deserving of an additional local outlet of FM self-expression.

In its Comments herein, Montgomery demonstrated that the city of Cheyenne, Wyoming is very much in need of an additional, independently-owned, operated and programming outlet of local FM self-expression, since one or both of the Michael brothers (i.e., Victor A. Michael, Jr., and/or Van A. Michael and/or a company they control -- Magic City Media, Inc. -- owns, operates, controls or programs or will soon own, operate, control or program, three of the five present Cheyenne, Wyoming, commercial FM broadcasting stations (i.e., Radio Stations

KIGN(FM), KLEN(FM) and KOLZ(FM).² Thus, allocation of FM Channel 229A to Cheyenne, Wyoming, will serve the public interest by enhancing diversity in the ownership and control and programming of mass communications media in Cheyenne, Wyoming.

Yet, Victor A. Michael, through MCM, the purported counterproponent herein, has allegedly counterproposed allotment of FM Channel 229C2 to Grover, Colorado -- the community which MCM and Victor A. Michael, Jr., themselves contend has a population of only 135 persons (based on the 1990 U.S. Census). Counterproposal at 2. For the reasons set forth below, however, Grover is not a separate community for channel allotment purposes and is not deserving of its own channel allotment. Moreover, as shown below, procedurally, the MCM Counterproposal is unacceptable for filing. For these reasons, the Counterproposal must be summarily dismissed out of hand as unacceptable for filing.

II. The MCM Counterproposal Is Procedurally Defective

Under the terms of the Commission's Notice of Proposed Rule Making herein and the Appendix thereto, and under Section 1.420 of the Commission's Rules, counterproposals in channel allotment rulemaking proceedings are to be advanced only in initial comments. However, under the procedures established for this proceeding, proponents of a proposed FM channel allotment were required to affirm and state expressly that, if the requested FM channel is allotted, that party would apply for the channel within the appropriate filing window, and that, if the Commission were to award that party a construction permit, that party would build the station promptly. Although MCM states, at page 3 of its purported Counterproposal, that, if Channel 229C2 were allotted to Grover, Colorado, as it proposes, it would apply for a construction permit

² The call sign of KOLZ(FM) in Cheyenne was formerly KKAZ(FM).

for such facility at Grover, MCM does not state, as required, that, if it is awarded the construction permit, it would promptly build the station on Channel 229C2 in Grover, Colorado, as it proposes. This flaw is fatal to MCM's procedural posture in this case, and, because of this fatal flaw alone, MCM's purported Counterproposal must be summarily rejected out of hand as unacceptable for filing.

III. Grover, Colorado is Not a Community For FM Channel Allotment Purposes

MCM itself contends that Grover, Colorado, has a population of only 135 persons and is located in Weld County, Colorado. Counterproposal at 2. However, as shown below, the purported MCM Counterproposal is substantively defect and unacceptable for filing, since, as shown below, Grover, Colorado, is not a separate "community", for FM channel allotment purposes.

As shown above, MCM or one or both of the Michael brothers own, control or program three of the five commercial FM radio stations in Cheyenne, Wyoming, and will or does own, operate, control, or program AM Radio Station KUUY(AM), Cheyenne, Wyoming. Thus, MCM and/or one or both of the Michael brothers virtually controls broadcast media in the City of Cheyenne, Wyoming. Accordingly, the MCM purported Counterproposal for a Class C2 FM channel in Grover, Colorado, which only has a 1990 population of 135 persons, must be seen for what it truly is: viz, a blatant attempt by MCM and/or one or both of the Michael brothers to forestall any additional meaningful commercial radio competition in the City of Cheyenne, Wyoming, by having a Class C2 channel allotted on Channel 229 to Grover, Colorado -- a location which is not a distinct "community" for channel allotment purposes, and which simply cannot and will not be able to support any commercial FM radio stations -- especially a Class C2

FM station -- in any commercially viable manner. This is merely an attempt by MCM and/or one or both of the Michael brothers to amass unto themselves greater control of commercial broadcast facilities in Cheyenne. It is, therefore, not surprising that MCM, in its Counterproposal herein, has totally failed to commit itself to expeditiously building the station which it proposes on Channel 229C2 in Grover, Colorado. Plainly, neither MCM nor anyone else is ever likely to build such a station expeditiously, since such a station would simply not be commercially viable and would certainly not serve Grover, Colorado in particular.

In this regard, as noted above, Grover, Colorado, is simply a “hole in the wall” and is not a separate “community” for FM channel allotment purposes. Grover, Colorado, has no separate police department or sheriff’s department. Instead, Grover gets police coverage from Greeley, Colorado, which is located approximately 50 miles away from Grover and which is the county seat of Weld County, Colorado. Furthermore, Grover, Colorado, has no separate fire department; rather, fire coverage to Grover is provided only through a volunteer fire department. The 1990 edition of the Rand McNally Commercial Road Atlas does not even list Grover, Colorado as a separate place. Id. at 119. Grover, Colorado is simply a “wide spot in the road”, which is situated at least 50 miles from any nearby sizable population center.

Grover, Colorado, has no commercial establishments whatsoever, except for only one grocery/general store, one automobile repair shop and two cafes. No banking or financial institutions or other commercial establishments are present in Grover, Colorado. Montgomery is advised that there is a school and a post office located in the vicinity, but that these two entities are intended to serve the larger number of ranches and farms in the surrounding Weld County area, rather than to serve Grover, Colorado, specifically. Significantly, MCM has not

demonstrated, in its purported Counterproposal, that Grover is a separate “community” for FM channel allotment purposes.

Montgomery respectfully submits that Grover, Colorado, does not qualify as a “community” for FM channel allotment purposes and that MCM has failed to demonstrate to the contrary in its purported Counterproposal, and that, therefore, it would not serve the public interest to allot an FM channel to Grover, as is proposed by MCM. See Mokelumne Hill, California, 4 FCC Rcd 7108 (Policy and Rules Division, Mass Media Bureau 1989) (Held: That the petitioner had failed to establish that Mokelumne Hill qualified as a distinct “community” for channel allotment purposes, even though the Petitioner demonstrated that Mokelumne Hill had its own post office, as well as its own gas station, grocery store, five restaurants, a gun repair and upholstery service and an international bookbinding business.) Here, it must be noted that MCM has not even demonstrated that there are any local businesses, churches or other political institutions or business organizations in Grover, Colorado, which are specifically identified with street addresses in Grover, nor has MCM clearly demonstrated that, if, indeed, there are any such entities or organizations, they are intended to serve the residents of Grover specifically, as opposed to serving the entirety of the surrounding area. Indeed, Montgomery has here shown, above, that the contrary is true. This is a critical and fatal deficiency on the part of MCM, because, in past cases, the Commission has expressly rejected claims of “community” status in channel allotment proceedings where, as here, a clear nexus has not been shown by the purported counterproponent to the political, social and commercial organizations in what is alleged to be a “community” in question. See Lupton, Michigan, ___ FCC Rcd ___, DA 96-1776 (Policy and Rules Division, Mass Media Bureau, released November 1, 1996) (Held: the community of

Lupton, Michigan was not to be considered as a separate “community” for FM channel allotment purposes, notwithstanding a demonstration of the existence of numerous “community” elements); Gretna, Marianna, Quincy, and Tallahassee, Florida, 6 FCC Rcd 633 (Policy and Rules Division, Mass Media Bureau, 1991), and cases cited therein; Ellison Bay, Wisconsin, 9 FCC Rcd 2327 (Policy and Rules Division, Mass Media Bureau, 1994), recon. denied, 10 FCC Rcd 8082 (Policy and Rules Division, Mass Media Bureau, 1995). Significantly, in Lupton, Michigan, supra, the Commission denied allotment of an FM channel to Lupton, even though the population was 200 and even though Lupton could be located on the Rand McNally Commercial Atlas and did have a post office.

In light of all the foregoing, Grover, Colorado, is simply not a separate “community” for FM channel allotment purposes, nor have either MCM or either of the Michael brothers demonstrated to the contrary in their purported counterproposal herein. Indeed, Montgomery has demonstrated that the entirety of the attempted Grover, Colorado, channel allotment “scheme” by MCM was merely designed by MCM and/or the Michael brothers to avoid having the Commission assign an additional local FM commercial channel to Cheyenne, Wyoming, so that the control by MCM and/or the Michael brothers over broadcast media in Cheyenne might be consolidated in their hands.

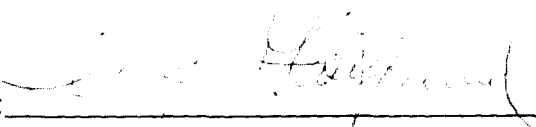
IV. Conclusion

For all the foregoing reasons, the public interest, convenience and necessity would best be served by not allotting any commercial FM channel to Grover, Colorado, as has been proposed herein by MCM; rather, the MCM alleged Counterproposal should be summarily dismissed as unacceptable for filing, on both procedural and substantive grounds. Rather, based

on all the foregoing, and on the comments filed herein, the public interest, convenience and necessity would best be served by expeditious allotment of FM Channel 229A to Cheyenne, Wyoming, as that community's sixth local transmission service, as proposed by the Allocations Branch in its Notice of Proposed Rule Making in the above-captioned proceeding.

Respectfully submitted

MONTGOMERY BROADCASTING LIMITED
LIABILITY COMPANY

By: 
Irving Gastfreund

Kaye, Scholer, Fierman, Hays & Handler, LLP
901 15th Street, N.W., 11th Floor
Washington, D.C. 20005
(202) 682-3526
Its Attorneys

February 11, 1997

CERTIFICATE OF SERVICE


I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that, on this 11th day of February, 1997, caused a copy of the foregoing "Reply Comments Of Montgomery Broadcasting Limited Liability Company", to be sent via U.S. Mail, postage prepaid, or caused to be hand-delivered to the following:

John A. Karousas, Esq.
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., 5th Floor
Washington, D.C. 20554

Sharon P. McDonald
Broadcast Analyst
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., 5th Floor
Washington, D.C. 20554

Allan G. Moskowitz, Esq.
Kaye, Scholer, Fierman, Hays & Handler, LLP
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005

Mr. Victor A. Michael, Jr.
President
Magic City Media, Inc.
1912 Capitol Avenue, Suite 300
Cheyenne, Wyoming 82001



Mary Odder